

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1917.

No. 3118. **462**

ERIC BERGLAND, APPELLANT,

vs.

FANNY J. OWEN AND MARGARET SANGSTON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 21, 1917.

PRINTED SEPTEMBER 25, 1917.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1917.

No. 3118.

ERIC BERGLAND, APPELLANT,

vs.

FANNY J. OWEN AND MARGARET SANGSTON,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

Original. Print

Caption	a	1
Declaration	1	1
Motion of Eric Bergland to be substituted as party defendant...	3	3
Affidavit of John R. Kirkwood.....	3	3
Motion of Eric Bergland to be made party defendant granted...	4	4
Plea	5	4
Joinder in issue.....	5	4
Suggestion of death of plaintiff, George J. Hilbus, and Margaret Sangston substituted as party plaintiff.....	5	4
Opinion	6	5
Finding of court in favor of plaintiffs on first count and in favor of defendant on second count of the declaration ; judgment ; appeal noted	10	7
Memorandum : Appeal bond approved and filed.....	10	7
Assignments of error.....	10	8
Designation of record.....	11	8
Clerk's certificate	12	8
Bill of exceptions.....	13	9
Agreed statement of facts.....	13	9

Court of Appeals of the District of Columbia.

No. 3118.

ERIC BERGLAND, Appellant,

vs.

FANNY J. OWEN et al.

a Supreme Court of the District of Columbia.

At Law. No. 57905.

FANNY J. OWEN, GEORGE J. HILBUS, Plaintiffs,

vs.

GEORGE WASHINGTON, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Declaration.

Filed April 6, 1915.

In the Supreme Court of the District of Columbia.

At Law. No. 57905.

FANNY J. OWEN, GEORGE J. HILBUS, Plaintiffs,

vs.

GEORGE WASHINGTON, Defendant.

The plaintiffs, Fanny J. Owen and George J. Hilbus, by their attorneys, C. Albert White and Charles A. Keigwin, sue the de-

fendant, George Washington, to recover of said defendant certain parcels of land and real estate situate in the City of Washington, in the District of Columbia, namely, those certain parcels of land which are known and described as lots lettered "E" and "F" in John Eschbach's subdivision of lots, in Square numbered one hundred and two (102), as said subdivision is recorded in the Office of the Surveyor for the District of Columbia in Book N. K., page 161, and all the rights, privileges and appurtenances to the said parcels of land or in anywise appertaining thereto.

And the plaintiffs aver that heretofore, to wit, on the 15th day of July in the year 1913, they were lawfully in possession of the said parcels of land, and were lawfully entitled to the possession thereof, as tenants in common owning, and being by law vested with, the title to, two-thirds of said parcels of land, the same being undivided; on which said day the defendant unlawfully entered upon the said land and ejected the plaintiffs therefrom; and the defendant has since the said day and from thence hitherto unlaw-

fully and unjustly detained, and still unlawfully and unjustly detains the said land from the plaintiffs.

And the plaintiffs claim the possession of the said land as tenants in common in fee simple entitled to an undivided interest in two-thirds thereof and to two-thirds of the undivided title thereto, together with costs of this suit.

II. And the said plaintiffs further sue the said defendant for money payable by the said defendant to the said plaintiffs as mesne profits on account of the said parcels of land in the first count hereof designated and described, for that heretofore, to wit, on the 15th day of July in the year 1913, at the City of Washington in the District of Columbia, the said plaintiffs being then and there in lawful possession of the said parcels of land and being then and there, and thereafter hitherto, lawfully entitled to the said possession and to the use of the said land and to two-thirds of the rents, issues and profits thereof, the said defendant unlawfully ejected the said plaintiffs from the said land and unlawfully took possession thereof; and the said defendant has since, from the day last aforesaid hitherto, been and remained in possession of the said land, detaining the same from the plaintiffs, and has occupied and used and still doth use and occupy the same, and has taken and received, and still takes and receives, the rents, issues and profits arising and accruing from the said land, which said rents, issues and profits have amounted, during the period aforesaid, to the sum of Two Hundred and forty (\$240) dollars;

And the said plaintiffs claim on account thereof the said sum of Two Hundred and Forty (\$240) dollars, together with interest on One Hundred and Forty-four (\$144) dollars, parcel of the said sum, at the rate of six per cent per annum from the 15th day of July in the year 1914, and interest at the rate aforesaid on Ninety-six (\$96) dollars, parcel of the said sum from the 15th day of February in the year 1915, together with the costs

of this suit and the rents, issues and profits accruing during the pendency of this suit.

C. ALBERT WHITE,
CHARLES A. KEIGWIN,
Attorneys for Plaintiffs.

Motion of Eric Bergland to Be Substituted as Party Defendant.

Filed April 26, 1915.

* * * * *

Comes now Eric Bergland, by William G. Johnson, his counsel, and moves the Court to enter an order herein substituting him, the said Eric Bergland, as party defendant, in the place and stead of the above-named defendant, George Washington, and for cause shows, that the said defendant is the tenant and lessee of the said Eric Bergland and that said plaintiffs claim against the title of said Eric Bergland as landlord of the defendant, George Washington.

WM. G. JOHNSON,
Attorney for Eric Bergland.

Affidavit of John R. Kirkwood.

DISTRICT OF COLUMBIA, ss:

John R. Kirkwood, being first duly sworn, deposes and says: That he is an employee of the corporation Tyler & Rutherford, which corporation is engaged in the general business of real estate broker. That as such broker, the said corporation has for many years past been the agent of Eric Bergland who claims to
4 be the owner in fee of the real estate described in the declaration, in ejectment, of Fanny J. Owen and George J. Hilbus against George Washington in cause No. 57,905, at Law in the Supreme Court of the District of Columbia. That this affiant has charge of the rental department of the said corporation and has personal knowledge that said defendant, George Washington, is in possession of the land sued for, as the lessee and tenant of the said Eric Bergland, under and through said Tyler & Rutherford, as agents and brokers for said Bergland, and that he does now pay and for many years past has paid rent for said real estate to said Tyler & Rutherford who have accounted therefor to said Bergland and that said Washington still recognizes and acknowledges the said relating of landlord and tenant and has never disputed or questioned the same.

JOHN R. KIRKWOOD.

Subscribed and sworn to before me this 20th day of April, 1915.

[SEAL.]

ALBERT W. SIOUSSA,
Notary Public, D. C.

Supreme Court of the District of Columbia.

MONDAY, April 26th, 1915.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

Upon consideration of the motion of Eric Bergland, filed herein by Mr. William G. Johnson, his counsel, this 26th day of April, 1915, it is ordered that said Eric Bergland, be and he is hereby substituted as party defendant in the place and stead of George Washington, his tenant and lessee.

5

Plea.

Filed April 27, 1915.

* * * * *

Comes now Eric Bergland, substituted defendant in the above cause, in the place and stead of George Washington, the original defendant herein, and for plea to the declaration herein and to the several counts thereof says that he is not guilty in manner and form as the plaintiff hath alleged.

WM. G. JOHNSON,
Attorney for Defendant Eric Bergland.

Joinder in Issue.

Filed May 1, 1915.

* * * * *

The plaintiff joins issue upon the pleas herein filed by the defendant.

CHAS. A. KEIGWIN,
C. ALBERT WHITE,
Attorneys for the Plaintiffs.

Supreme Court of the District of Columbia.

MONDAY, November 27th, 1916.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * *

Comes now Mr. C. Albert White, of counsel for the plaintiffs, and suggests to the Court the death of the plaintiff George J. Hilbus, and advises that said deceased plaintiff leaves as his only child and

sole heir at law, Margaret Sangston, whom he prays may be substituted as party plaintiff in the place and stead of said George J. Hilbus, which is now by the Court so ordered.

6

Opinion.

Filed June 12, 1917.

* * * * *

This is an action of ejectment which has been submitted to the court on an agreed statement of facts for its determination of a question of law that the record presents, and as that question is decided so, according to the agreement is judgment to run, without prejudice, however, to the party against whom judgment runs to appeal therefrom.

The action is to recover lots "E" and "F" in a subdivision of lots in Square 102, City of Washington, District of Columbia. The plaintiffs are heirs at law of the late Mary Hilbus, and the defendant claims title to the property as the remote alienee of a conveyance in fee from said Mary Hilbus.

The common source of title was the father of the said Mary Hilbus, who died on or about the 6th of January, 1874, seized and possessed of the lots mentioned, and leaving a will dated April 12, 1866, and admitted to probate and record by this Court, sitting as a Probate Court, on January 20, 1874. The material provision of his will is as follows:

"I give and bequeath unto Solomon Stover in Trust for my daughter, Mary Hilbus, widow of George Hilbus, deceased, those two lots of ground situated in the said City of Washington and known and described as lots E and F in the Subdivision of lots eleven and twelve in square numbered one hundred and two (102), each of said lots fronting twenty feet and five inches on Twenty-First Street West, and running back one hundred and one feet eleven inches, being the lots that were conveyed to me by Deed from Charles F. Wilstach and Wife, dated 1st October, 1839, and duly recorded in the Land Records of Washington County, D. C., together with all the buildings, improvements, appurtenances thereto belonging, the said premises to be for the sole use, benefit and behoof of her, the said Mrs. Mary Hilbus for and during the term of her natural life, free from any control or interest, claim or demand of any future husband that she may marry, or of any of her children, or of any person or persons whomsoever, and at her death the said lots of ground and premises, with the appurtenances, to be the property of her heirs in fee simple forever."

7

The only question presented by the record is whether the Statute of Uses operated upon this devise and vested a fee simple title in the said Mary Hilbus. If it did, the judgment must be for the defendant; if it did not, for the plaintiffs.

Plaintiffs claim that the Statute did not operate upon the devise because of a well established principle, which is that the Statute does not operate where the life estate attempted to be devised is equitable in character, while the remainder over to the heirs is legal. It does not appear to be contended by the defendant that this principle is not as claimed by the plaintiffs, but he insists that the reasons for the principle in such a case as this, disappeared with the enactment of the Married Women's Act by Congress in April, 1869, about three years after the date of the will of Mary Hilbus' father and nearly five years before his death. If that statute does not have the effect claimed for it by the defendant, then whether the trust declared by the will was a passive, inactive or dry trust, or was an active trust is immaterial. For it is settled law in this jurisdiction that where the trust is designed for the protection of a woman who may become a feme covert, then the Statute of Uses does not operate even though the trust be of the first mentioned character. Slater v. Rudderforth, 25 App. D. C. 497, 505 et seq.

8 Mary Hilbus was a widow at the time her father executed the will in question, and was the mother of children born of her marriage. She never remarried, but died in the District of Columbia, intestate, on or about the 15th of July, 1913, having previously, and on the 30th day of September, 1890, made the conveyance in fee of the property involved, under which conveyance the defendant claims the property.

The defendant claims that the Married Women's Act not only removed many of the common law disabilities of a married woman in dealing with her real property, but also put an end to the husband's common law rights therein, which among other things gave him, immediately upon marriage with the owner of said property, the right to its rents and profits; and he further contends that it was against these common law rights of the husband that her father designed to protect her by the trust provision in his will.

But the Married Women's Act did not completely deprive the husband of his old common law rights. For instance, if a married woman, the owner of real property, upon which the Married Women's Act operated, died intestate, there having been born of such marriage children, the husband's right to the exclusive possession and enjoyment of said real estate for his life remained as at common law. Smith v. Smith, 21 W. L. R. 71; Barrett v. Byrne, 21 W. L. R. 75; Uhler v. Adams, 1 App. D. C. 392, 398.

9 Even then if the contention of the defendant is sound as to the other common law rights of the husband, here is one against which the testator could have provided. This would suffice to save the devise from the operation of the Statute of Uses, and doing so, it is not necessary to determine otherwise the soundness of the defendant's contentions. But in passing these contentions by in disposing of this matter, it is not to be understood that the Court acquiesces in them. It is quite conceivable that, notwithstanding the Married Women's Act, there still may exist the strongest reasons for protecting a wife from the possible threats or cajolery of a husband seeking to obtain from her in one way or

another the benefit of her statutory real estate. *Fields v. Gwynn*, 19 App. D. C. 99, 109, et seq.

In this view of the matter, the conclusion is that the Statute of Uses did not operate upon this provision of the will and the property which was the subject matter of it; that the late Mary Hilbus had but an equitable life estate in the property, with the remainder in fee to her heirs.

The plaintiffs have vested in them an undivided two-thirds interest in fee in the property, and a judgment in their favor therefor must be entered under the first count of the plaintiff's declaration. Under the second count, the judgment is for the defendant.

F. L. SIDDONSON,
Justice.

June 12, 1917.

Supreme Court of the District of Columbia.

TUESDAY, June 19th, 1917.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys; whereupon the Court announces its finding in this cause heretofore argued and submitted on the agreed statement of facts filed, in favor of the plaintiffs on the first count of the declaration
10 and in favor of the defendant on the second count of the declaration.

Wherefore, it is considered that plaintiffs do have and recover of the defendant under the first count of the declaration possession of those certain parcels of land situate in the City of Washington, in the District of Columbia, known and described as lots lettered "E" and "F," in John Eschbach's subdivision of lots, in Square numbered one hundred and two (102) as said subdivision is recorded in the Office of the Surveyor for the District of Columbia, in Book N. K., page 161, together with costs of suit to be taxed by the clerk and have execution thereof.

Further it is considered that the plaintiff take nothing by this action under the second count of the declaration, that as to said count the defendant go hence without day, and be for nothing held.

From the judgment on the first count of the declaration, the defendant by his attorney, in open Court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of Three Hundred Dollars.

Memorandum.

July 9, 1917. Appeal bond approved and filed.

Assignments of Error.

Filed July 18, 1917.

* * * * *

1. The Court erred in entering judgment for the plaintiffs on the first count of the declaration.
- 11 2. The Court erred in not entering judgment for the defendant upon the first count of the declaration.

WM. G. JOHNSON,
Attorney for Defendant, Bergland.

Designation of Record.

Filed July 18, 1917.

* * * * *

The Clerk of the Court will please prepare transcript of record on appeal to the Court of Appeals in the above-entitled cause, and include therein the following:

1. Declaration.
2. Motion of Eric Bergland to be substituted as defendant, and affidavit.
3. Order substituting Eric Bergland, defendant.
4. Plea of defendant.
5. Joinder of issue.
6. Suggestion of death of George J. Hilbus and substitution of Mary Sangston as plaintiff, in his stead.
7. Opinion of Court, filed June 12, 1917.
8. Judgment of Court and appeal to Court of Appeals.
9. Appeal bond approved and filed.
- 9½. Assignments of error.
10. This designation.

WM. G. JOHNSON,
Attorney for Eric Bergland.

12 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 11, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57905 at Law, wherein Fanny J. Owen and George J. Hilbus are plaintiffs and George

Washington is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of July, 1917.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

13 In the Supreme Court of the District of Columbia.

No. 57905. At Law.

FANNY J. OWEN, GEORGE J. HILBUS, Plaintiffs,

vs.

ERIC BERGLAND, Substituted Defendant.

Bill of Exceptions.

Be it remembered, that at the trial of this cause, the parties, plaintiff and defendant, stipulated to waive a trial by jury and to submit to trial by the Court, upon an agreed statement of facts, filed in the cause on the 2nd day of December, 1916, which agreed statement of facts is in the words and figures following, that is to say:

"Agreed Statement of Facts.

It is stipulated and agreed by and between the plaintiffs and Eric Bergland, the substituted defendant herein, through their respective attorneys, that the following statement contains all the facts material to determine the issue joined in the above-entitled cause, and that upon the said facts and the pleadings the Court shall render judgment, without the intervention of a jury, each and every of said parties reserving his and her right of exception to and appeal from such judgment as the Court may render. The said facts are as follows: That one Robert Earl, a citizen of the United States and a resident of the City of Washington, District of Columbia, died in said City and District on or about the sixth day of January, 1874, seized and possessed of the following described real estate situate in said City and District, namely, lots lettered "E" and "F" in John Eschbach's subdivision of lots in square numbered one hundred and two (102), as said subdivision is recorded in the Office of the Surveyor for the District of Columbia in Book N. K., page 161, and that the said Robert Earl left a last will and testament executed in due form of law to pass real estate in said District aforesaid, the same bearing date the 12th day of April, 1866, and admitted to

14 probate and record by the Supreme Court of the District of Columbia sitting as a Probate Court on January 20th, 1874.

And that among the provisions of the said will appears the following item, "I give and bequeath unto Solomon Stover in Trust for my daughter, Mary Hilbus, widow of George Hilbus, deceased, those two lots of ground situated in the said City of Washington and known and described as Lots E and F in the Subdivision of lots eleven and twelve in square numbered one hundred and two (102), each of said lots fronting twenty feet and five inches on Twenty-First Street, West, and running back one hundred and one feet eleven inches, being the lots that were conveyed to me by Deed from Charles F. Wilstach and Wife, dated 1st October, 1839, and duly recorded in the Land Records of Washington County, D. C., together with all the buildings, improvements, appurtenances thereto belonging, the said premises to be for the sole use, benefit and behoof of her, the said Mrs. Mary Hilbus for and during the term of her natural life, free from any control or interest, claim or demand of any future husband that she may marry, or of any of her children, or of any person or persons whomsoever, and at her death the said lots of ground and premises, with the appurtenances, to be the property of her heirs in fee simple forever."

That the above-mentioned lots of ground are the same mentioned and described in the declaration filed in this cause; and that the above-mentioned Mary Hilbus was the daughter of the said testator, Robert Earl, and was at the time of the death of the said testator, the widow of one George Hilbus, and continued to be such widow up to the time of her death; that the said Mary Hilbus took actual possession of said land and exercised full control and ownership over the said real estate, from the time of the death of her father, the said Robert Earl, down to the 30th day of September, 1890, on which said date she executed a deed purporting to convey in fee simple the said lots of ground above mentioned and described to one Jere H. Wheelwright, in consideration of \$6000., the said deed of conveyance being recorded among the land records of the District of Columbia on September 30th, 1890, in Liber No. 1525,

15 folio 189, and the said Wheelwright entered into possession of said lots at said time. The said Solomon Stover mentioned in said will, did not join in said deed to said Wheelwright or ever execute a deed to said property.

That on the said 30th day of September, 1890, said Jere H. Wheelwright executed a deed purporting to convey said lots in fee to James A. Bates and Edward S. Wescott, which was duly recorded the same day in Liber 1525, folio 191, in trust to secure the payment of \$3900. to said Mary Hilbus.

Thereafter, on October 21st, 1890, said Wheelwright executed a deed purporting to convey the said lots in fee to one Barrington K. West, subject to \$3900. secured by deed of trust, which grantee assumed as part consideration, which deed was duly recorded on October 23, 1890, in Liber 1529, folio 339, and said West entered into possession of said lots.

Thereafter, on March 10, 1903, said Barrington K. West and his wife, executed a deed purporting to convey said lots in fee to Eric Bergland, said deed being duly recorded on March 23rd, 1903, in Liber 2726, folio 52, and said Bergland entered into possession thereof.

That on March 23rd, 1903, said Bates and Wescott executed a deed of release, which was duly recorded April 28th, 1903, in Liber 2715, folio 373, whereby they purported to release said lots from the above-described deed of trust to said Bergland in fee, and recited the payment of the debt and production of the cancelled notes.

And that the said Eric Bergland, substituted defendant herein, claims title in fee simple to said lots of ground above mentioned and described, by virtue of said mesne conveyances above recited.

And that the said Mary Hilbus died intestate, unmarried, being a widow, in the City of Washington, District of Columbia, on or about the 15th day of July, 1913, and left as her sole heirs at law the plaintiffs in this cause, who are her children and also certain other parties, the children of one Rose Harley, a daughter of said Mary Hilbus, who predeceased her mother. That the plaintiff George Hilbus died March 11, 1916, intestate, leaving Margaret Sangston as his only heir at law.

16 And that the said property is improved by two two-story brick houses, numbered 723 and 725 respectively, 21st Street, N. W., Washington, District of Columbia, worth in the aggregate the sum of \$15 per month gross. That the said property has only yielded from July 15, 1913, to November 30, 1916, the aggregate sum of \$146.

And that the said substituted defendant is now and has been since the 10th day of March 1903, in the possession of said property and claiming ownership thereof in fee, by virtue of the said deed to him, dated March 10th, 1903, recorded in liber 2726, folio 32, of the land records of the District of Columbia, and of the other deeds and possessions hereinbefore recited.

The said substituted defendant has paid all taxes assessed against said real estate since the conveyance to him and all repairs. That the aggregate paid for taxes from July 15, 1913, to November 30, 1916, amounted to \$185.46 and for repairs during the same period, amounts to \$32.40.

C. ALBERT WHITE,
CHAS. A. KEIGWIN,
Attorneys for Plaintiff.

WM. G. JOHNSON,
Attorney for Substituted Defendant."

This bill is agreed to.

C. ALBERT WHITE,
Counsel.

And the said agreed statement of facts being all the evidence offered in the cause, plaintiffs and defendant alike rested. Whereupon the plaintiff moved the Court to enter judgment for the plaintiffs,

to which motion defendant objected and moved the Court to enter judgment for the defendant, to which motion plaintiffs objected and the Court overruled defendant's objection to the motion of plaintiffs and overruled defendant's motion for judgment in defendant's behalf and directed judgment to be entered for plaintiff.

To which judgments in this behalf the defendant then and there severally excepted and the presiding Justice noted the said exceptions upon his minutes, which the defendant prays may be saved to him, signed and sealed and made part of the record in this case, which is accordingly done this 17th day of July, 1917, nor for then.

F. L. SIDDONS,

Justice.

17 [Endorsed:] No. 57,905. At Law. Fanny J. Owen vs. Eric Bergland. Bill of Exceptions. Wm. G. Johnson, Attorney and Counsellor at Law, Fendall Law Building, Washington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No. 3118. Eric Bergland, appellant, vs. Fanny J. Owen et al. Court of Appeals, District of Columbia. Filed Aug. 21, 1917. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 30 1917

Henry W. Adams
Chlorke

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1917.

No. 3118.

ERIC BERGLAND, APPELLANT,

vs.

FANNY J. OWEN AND MARGARET SANGSTON.

BRIEF FOR APPELLANT.

WM. G. JOHNSON,

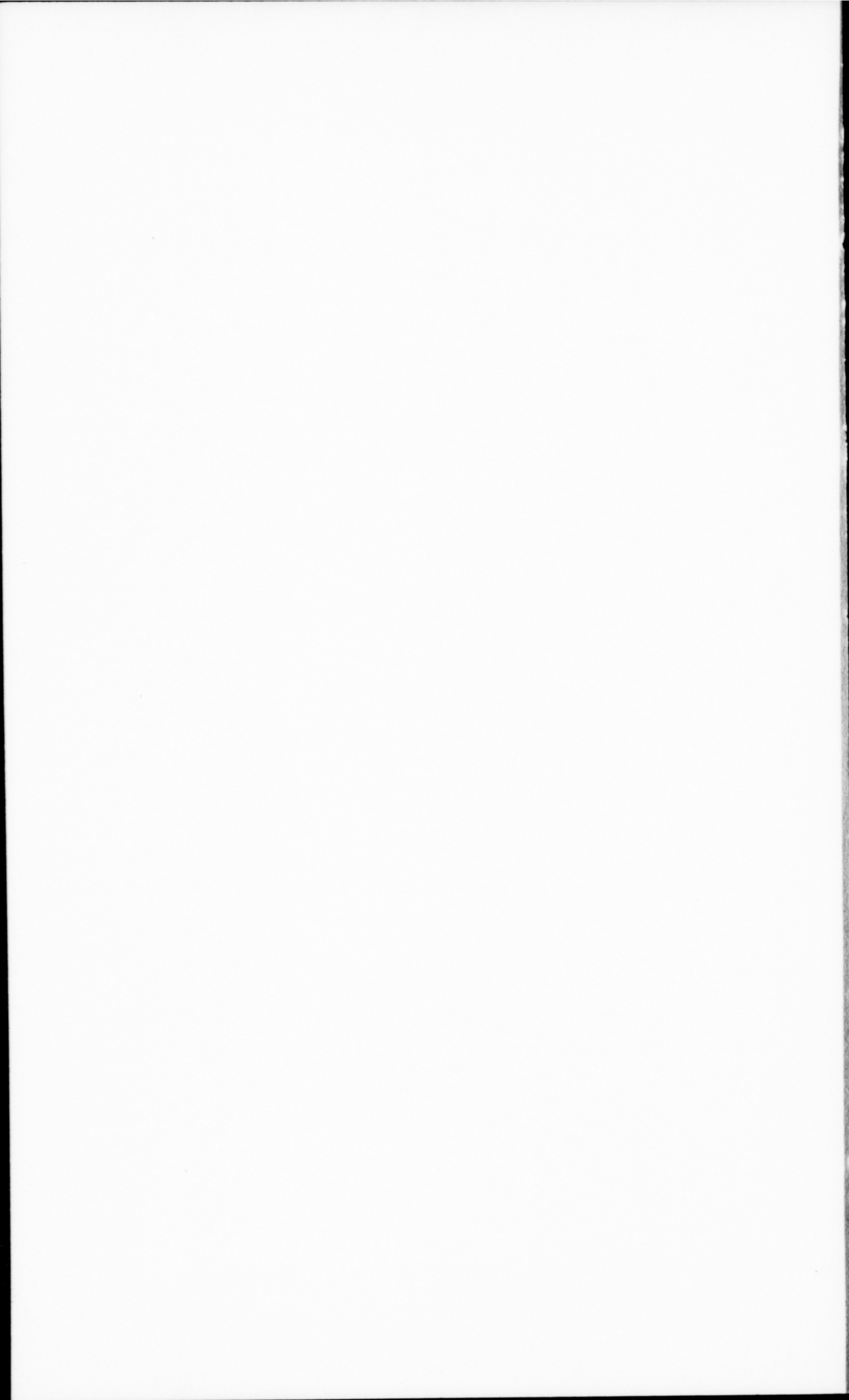
Counsel for Appellant.

INDEX.

	Page
Statement.....	1
Assignment of Errors.....	4
Argument.....	5

Authorities Cited.

Bank <i>vs.</i> Hitz, 1 Mackey, 111, 138-40.....	13
Bowen <i>vs.</i> Chase, 94 U. S., 812.....	20
Brown <i>vs.</i> Wadsworth, 168 N. Y., 232.....	19
De Vaughn <i>vs.</i> De Vaughn, 3 App. D. C., 50.....	18
Fields <i>vs.</i> Gwynn, 19 App. D. C., 99.....	18
Frey <i>vs.</i> Allen, 9 App. D. C., 400.....	18
Hitz <i>vs.</i> National Metropolitan Bank, 111 U. S., 722.....	10, 12
Keyser <i>vs.</i> Hitz, 113 U. S., 138.....	14
Mattoon <i>vs.</i> McGrew, 112 U. S., 713.....	13
Smith <i>vs.</i> Smith, 21 D. C., 289.....	12, 15
Stickney <i>vs.</i> Stickney, 131 U. S., 227.....	13
Sykes <i>vs.</i> Chadwick, 18 Wall., 141.....	9, 12, 15
Uhler <i>vs.</i> Adams, 1 App. D. C., 392.....	13, 15
Zeust <i>vs.</i> Staffan, 14 App. D. C., 200	22



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1917.

No. 3118.

ERIC BERGLAND, APPELLANT,

vs.

FANNY J. OWEN AND MARGARET SANGSTON.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment of the Supreme Court of the District of Columbia (Rec., p. 7). The action was ejectment to recover an undivided two-thirds of two lots and was brought, originally, by Fanny J. Owen and George J. Hilbus against George Washington, the tenant of appellant, in possession (Rec., pp. 1-3).

On motion, supported by affidavit, under section 984 of the Code, the appellant, Eric Bergland, was substituted defendant, in the place of Washington (Rec., pp. 3-4), and the said appellant then appeared and pleaded the general issue (Rec., p. 4). Thereafter the death of the plaintiff, George J. Hilbus, was suggested to the court, and his only heir at law, Margaret Sangston, was substituted as a party plaintiff, in his place and stead (Rec., pp. 4-5). The action then proceeded between this appellant and these appellees. By stipula-

tion of the parties, set out in the Bill of Exceptions (Rec., pp. 9-11), an agreed statement of the facts was submitted to the court, containing all the facts material to the determination of the issue joined, and it was further agreed, in said stipulation, that upon those facts and the pleadings, the court should render judgment, without the intervention of a jury, each party reserving all rights of exception to and appeal from such judgment (Rec., p. 9).

After hearing counsel for the parties and consideration of the matters presented in their behalf, the court rendered the judgment for plaintiffs (Rec., p. 7), from which this appeal is prosecuted.

The facts material to the legal questions presented by the record are these: Robert Earl was seized of the lands described in the declaration, and being so seized, died, testate, on the 6th of January, 1874, his last will and testament having been executed, in due form of law to pass real estate, on the 12th day of April, 1866 (Rec., p. 9). This will was admitted to probate by the Supreme Court of the District of Columbia, January 20, 1874, and devised the land in controversy by the following words (Rec., p. 10):

“I give and bequeath unto Solomon Stover in trust for my daughter, Mary Hilbus, widow of George Hilbus, deceased, those two lots of ground situated in the said city of Washington and known and described as Lots E and F in the subdivision of lots eleven and twelve in square numbered one hundred and two (102), each of said lots fronting twenty feet and five inches on Twenty-first Street, west, and running back one hundred and one feet eleven inches, being the lots that were conveyed to me by deed from Charles F. Wilstach and Wife, dated 1st October, 1839, and duly recorded in the land records of Washington County, D. C., together with all the buildings, improvements, ap-

purtenances thereto belonging, the said premises to be for the sole use, benefit and behoof of her, the said Mrs. Mary Hilbus for and during the term of her natural life, free from any control or interest, claim or demand of any future husband that she may marry, or of any of her children, or of any person or persons whomsoever, and at her death the said lots of ground and premises, with the appurtenances, to be the property of her heirs in fee simple forever."

Mary Hilbus, named in this devise, was the daughter of the testator, was a widow at the death of the testator and continued a widow to the time of her own death. She took possession of the land at the death of the testator and exercised full control and ownership over it from the time of her father's death down to the 30th of September, 1890, on which date she executed a deed purporting to convey it *in fee* to one Jere Wheelwright for the consideration of \$6,000, the deed being recorded the same day. At the same time, Wheelwright the purchaser, executed a deed purporting to convey this real estate *in fee* to Bates and Wescott, in trust to secure the payment to Mary Hilbus of the sum of \$3,900, which deed was also immediately recorded (Rec., p. 10).

The following October, Wheelwright conveyed the land to Barrington K. West, by deed purporting to convey *in fee*, in which *West assumed payment of the \$3,900 due to Mary Hilbus, as part of the consideration*, and this deed was at once recorded (Rec., p. 10).

On March 10, 1903, West conveyed the land to this appellant, Bergland, by deed purporting to convey *in fee*, which deed was recorded March 23, 1903, and Bergland entered into possession. On the same day Bates and Wescott, the trustees under the deed to secure Mary Hilbus, executed a release of the said deed of trust, and conveyed the land to Bergland *in fee*, reciting in said

deed of release, the *payment of the debt and production and cancellation of the notes*. Bergland is now, and since the 10th of March, 1903, has been in possession of said land and claims title *in fee*, by virtue of the mesne conveyances and possessions above recited and has paid all taxes and repairs since the conveyance to him. The property is improved by two small brick houses, worth, in the aggregate, \$15 per month, gross, and from July 15, 1913, to November 30, 1916, has only yielded the aggregate sum of \$146, while the taxes paid by appellant during the same period amounted to \$185.46 and the repairs, also paid by him, during the same period amounted to \$32.40 (Rec., p. 11).

Mary Hilbus, the devisee of Earl, died, intestate *and unmarried*, in this city, July 15, 1913, and left, as her heirs at law, a daughter, the plaintiff, Fanny J. Owen, and a son, the plaintiff, George J. Hilbus, and the children of another daughter, Rose Harley, who predeceased her (Rec., p. 11). These heirs, the children of Rose Harley, are not parties to the suit. The plaintiffs, in their declaration, claimed they were in possession of this real estate on July 15, 1913, and were lawfully entitled to possession, as tenants in common, vested with the title to *two-thirds* of said real estate, and that, on that day, the defendant unlawfully entered upon the land and ejected the plaintiffs (Rec., p. 2). The judgment entered, it will be observed, is for the recovery of the *whole of the lots* instead of the *undivided two-thirds, claimed in the declaration* (Rec., p. 7).

Assignment of Errors.

1. The court erred in entering judgment for the plaintiffs upon the first count of the declaration.
2. The court erred in not entering judgment for the defendant upon the first count of the declaration.

ARGUMENT.

The contention of the plaintiffs, in the court below, was that Mary Hilbus took only a life estate, because, they claimed, that the will created an *equitable* estate in Mary Hilbus, for life, and a *legal* estate, in remainder to her heirs, and consequently the two estates did not coalesce under the rule in Shelley's case.

It is, of course, conceded by appellant, that if the will creates an equitable estate for life and a legal estate in remainder, to the heirs of the life tenant, no coalescence takes place, and the question presented by the record is whether the will does create both *equitable* and legal estates.

On behalf of appellant it is claimed that the fee simple passed to Mary Hilbus. That the supposed trust for life is a mere dry trust upon which the statute of uses operates, transferring the legal estate to the life tenant (1), because there are no active duties to be performed by the trustee; (2) it is inefficacious to preserve a separate estate for a married woman; and, also, (3) if the life estate be equitable, so also is the remainder to the heirs of the life tenant.

I.

The Supposed Trust Creates No Active Duties.

Laying to one side, under the discussion of this topic, all supposed provision to preserve a separate estate for a married woman, the terms of the will, briefly stated, are as follows (Rec., p. 10):

“I give and bequeath unto Solomon Stover in trust for my daughter, Mary Hilbus . . . those two lots of ground . . . together with all the buildings, improvements, appurtenances thereto belonging, the said premises to be for the sole use, benefit and behoof of her the said Mrs.

Mary Hilbus for and during the term of her natural life, . . . and at her death the said lots of ground and premises, with the appurtenances, to be the property of her heirs in fee simple forever."

There is nothing to be done by the trustee; he is not to collect, receive or disburse rents or other income; he has no duty to pay taxes or make repairs or otherwise to preserve the estate. In fact, he has absolutely nothing to do with the estate *during the life of Mary Hilbus*, any more than he has, *after her death*, with respect to the interest of her heirs, to whom he is not even directed to convey. Indeed, the devise is typical of those to which the statute of uses, in terms applies, and it was not contended, in the court below, nor held in the court's opinion (Rec., pp. 5-7) that the supposed trust could be sustained, against the operation of the Statute of Uses, otherwise than as one for the protection of a feme covert.

II.

The Supposed Trust Is Inoperative to Maintain a Separate Estate for a Feme Covert.

In order that an *inactive* trust shall be operative to preserve a separate estate for a named *cestui que trust*, there must be some legal disability in the named *cestui que trust* or some legal obstacle to absolute dominion over the estate by the *cestui que trust*, to be the subject of a separate estate, which disability or obstacle will be overcome by the vesting of the legal estate in a trustee for the benefit of the *cestui que trust*. If there be no disability or obstacle, obviously the trust can afford no protection. If there be any such, and the trust does not reach it, it is equally futile.

It is believed that it may be confidently asserted that

if the common law had not vested the husband with certain *legal rights* in the estate of the wife, trust estates for the sole and separate use of the wife would be unknown to the law. The sole *raison d'être* of such trusts was the *legal right*, of the husband, in the estate of the wife. Consequently, if a statute sweeps away all those legal rights, a trust to preserve the estate, as a sole and separate estate to the wife, is not only *unnecessary* but *inoperative*, since no one can accomplish, by deed or will, what a lawful statute has already established.

It is respectfully submitted that (a) the Act of Congress of April 10, 1869, commonly known as the Married Women's Act, had already created as complete a sole and separate estate, both at law and in equity, for the *feme covert*, as anything attempted by the will in this case, and (b) if there was any legal disability or obstacle which the Act of Congress did not reach, the supposed trust under the will also failed to reach it.

a.

The Statute Had Done All That the Will Attempts to Accomplish.

As shown by the agreed statement of facts, though the will was made in 1866, before the Married Women's Act was passed, the testator did not die until January 6, 1874, so that the will did not become operative until nearly *five years after* the passage of the Married Women's Act. The statement also shows that the testator's daughter, Mary Hilbus, was a *widow* at the time of the testator's death and continued to be a widow to the time of her own death, about July 15, 1913, and the property, which is *real estate*, was not derived, in any way, from her deceased husband, but came to her from her father.

During the interval of thirty-nine years and six months elapsing between the date of the death of the testator and the death of his daughter, four Married Women's

Acts have been in force in this district, viz: the original act of April 10, 1869 (16 Stat., p. 45); the amended revision thereof, of June 22, 1874 (R. S. D. C., secs. 727 to 730); the amendatory and repealing act of June 1, 1896 (29 Stat., pp. 193-4), and the provisions of the present code. The only statute properly to be considered here, however, is the *one in force at the time the will became effective, through the death of the testator*, on January 6, 1874, namely, the original act of April 10, 1869, and this discussion is confined to the statute in its form at that time.

A comparison of the provisions of that act with the terms of the devise will show that the will is wholly inefficacious to afford any immunity from the marital claims or rights which any future husband of the daughter might have set up, because that immunity was already completely secured by statute, and that, so far as creating a separate estate against such claims is concerned, the will was wholly useless.

For convenience of comparison, the material provisions of the will and the relevant terms of the statute are placed in parallel.

The Will.

"I give and bequeath unto Solomon Stover in trust for my daughter, Mary Hilbus, widow of George Hilbus deceased, (Here follows description of land) the said premises to be for the sole use, benefit and behoof of her, the said Mrs. Mary Hilbus for and during the term of her natural life *free from any control or interest, claim or demand of any future husband that she may marry.*"

The Statute.

"In the District of Columbia the right of any married woman to any property, personal or real . . . shall be as *absolute as if she were feme sole* and shall not be subject to the disposal of her husband nor be liable for his debts; but such married woman may *convey* devise and bequeath the same or any interest therein, in the same manner and with like effect as if she were *unmarried.*"

The only purpose of the will or of the statute was to meet conditions created by the common law. What were those conditions?

At common law (disregarding personal property and chattels real not here involved) the marriage vested in the husband (a) *during the life of the wife*, the right of possession of her freehold estates, whether for life or of inheritance, and the right to the rents and profits therefrom, and the same were liable for his debts, and (b), *after her death*, if competent issue of the marriage were born alive, and he survived her, the right during *his* life to possession and the rents and profits of the *inheritance*, that is, his tenancy by the curtesy, and this, also was liable for his debts.

The will purports to preserve the estate to the wife *during her life* "free from any control or interest, claim or demand" of any future husband, and nothing more.

The statute declared that her right to this property shall be "*as absolute as if she were a feme sole*;" that it shall not be "subject to the *disposal* of her husband nor be *liable for his debts*"; that she "*may convey, devise and bequeath*" it "*in the same manner and with like effect as if she were unmarried*."

Unquestionably, this language of the statute is fully adequate to accomplish the only thing the will attempts to accomplish, namely, to make the estate "*during the term of her natural life*" "*free from any control or interest or demand*" of any future husband. Indeed the language of the statute is even more comprehensive and its legal effect has been so construed.

The first reported case under the statute is the case of *Sykes vs. Chadwick*, 18 Wall., 141, decided by the Supreme Court of the United States at October Term, 1873, and which arose out of a transaction occurring October 15, 1869 (p. 142) a trifle over six months after the passage of the act. In that case, the court, through Mr.

Justice Bradley, discussing the effect of the statute upon the marital rights of the husband says (p. 145):

“We think it clear that it does not refer to her contingent interest in her husband’s estate, but to property owned by or coming to her independent of her husband—property which, *but for the statute, he would acquire an interest in by right of marriage.* The sole object of the statute was to *prevent his acquiring such interest in her property.*”

The next case in the Supreme Court of the United States which arose under this statute was *Hitz vs. National Metropolitan Bank*, 111 U. S., 722, decided in May, 1884. In that case the court, through Mr. Justice Miller, said (p. 729):

“There can be *no question* that this statute *exempts* the wife’s property from the *control* of her husband and all liability for his debts as to all property coming to her from any source but him, after its enactment.”

And further in the opinion states (p. 730):

“It is urged, however, that the plain purpose of the statute was to *deprive the husband of all legal interest in the property of the wife*, and it must, therefore, be construed to relate only to property acquired after the passage of the law. *For this purpose, however, the first clause of the declaration, namely, that her right to such property ‘shall be as absolute as if she were unmarried is amply sufficient.’*”

These decisions leave no room for doubt that the statute cut up, by the roots, and utterly annihilated, all pretense of “control,” “interest,” “claim,” or “demand” of the husband in the property of the wife, *while the wife was living*, from which “control” “interest,” “claim,” or “demand,” alone, the *trust in the will* sought to free her; and they also demonstrate that the law having abolished

any common law burden there was nothing upon which a *will* or other *act of the parties* could operate. The will was therefore as inefficacious as would have been a deed of manumission to a former slave, after the constitutional amendment abolishing slavery.

The only remaining incident of the marriage is the tenancy by the curtesy, which did not arise *during the life of the wife*, did not operate in diminution of *her* estate, but only affected the *heir*. For it must not be overlooked that at common law the interest which the husband enjoyed in the lands of the wife *during her life* was *no part of his curtesy*. That right to possession and to the rents and profits of the wife's lands, *during her life*, attached, as a marital right, *immediately upon the marriage*, even though he *never could be tenant by the curtesy*, for it attached to her *life estates*, and also to her estates of inheritance to which issue by him could *never* by any possibility be heir, whether born alive or not, and of which he could never be tenant by the curtesy. His tenancy by the curtesy arose *only after her death*; his survivorship of her was as essential to its existence as were her seisin and the birth alive of competent issue. True, the estate is spoken of as tenancy by the curtesy "*initiate*" while the wife is yet living, if the conditions of seisin and birth alive of competent issue have been fulfilled, but that is no *estate*, it draws to it *no right to possession or to rents and profits during her life*. At common law, the husband was, as above stated already, entitled to those as tenant *per autre vie*, *during the wife's life*, as an incident of the marriage, without regard to possible curtesy, and these rights were complete and perfect *eo instanti* that he married.

But even if it could be admitted that tenancy by the curtesy *initiate*, could also be an *estate* in the wife's lands which could attach *during her life*, and constitute an *additional* burden upon *her estate during her life*, then it

could no more attach under the Married Women's Act than his estate *per autre vie*, during her life, because, as decided in *Sykes vs. Chadwick*, 18 Wall. (p. 145):

"The sole object of the statute was to prevent his acquiring such interest (by right of marriage) in her property."

Also, it was decided in *Hitz vs. National Metropolitan Bank*, 111 U. S., 722, that (p. 731):

"It was the purpose of the statute to abolish this tenancy by the curtesy, or any other interest of the husband, in all her property, and to place her in regard to it in the condition of a feme sole."

This decision by the Supreme Court of the United States was rendered in May, 1884, and being the judicial construction of the act of Congress, by the highest court of the land, it could not be reversed or modified except by its own later decision. It was while this decision stood, as a rule of property in this District and on September 30, 1890, that, as shown by the agreed facts, Mary Hilbus conveyed this land *in fee* for \$6,000 to Wheelwright, from whom the defendant acquired it by mesne conveyances.

Eight and a half years after the decision by the Supreme Court of the United States, in Hitz vs. National Metropolitan Bank, 111 U. S. (*supra*), and *two years after the conveyance by Mrs. Hilbus*, the Supreme Court of the District, in General Term, in *Smith vs. Smith*, 21 D. C., 289, held that while the statute gave the wife *power* by deed or will to destroy curtesy, the statute did not, itself, abolish curtesy.

But the court also held that (p. 292):

"This statute necessarily extinguishes the husband's interest in the wife's property during coverture, although it does not mention that subject."

In the opinion of this case, the decision by the Supreme Court of the United States, in *Hitz vs. National Metropolitan Bank*, is not considered, referred to or mentioned.

A year later, in the case of *Uhler vs. Adams*, 1 App. D. C., 392, this court decided that the Married Women's Act did not abolish curtesy, following *Smith vs. Smith*, 21 D. C., *supra*. In that case this court does refer to the language used by the Supreme Court of the United States, in its opinion in *Hitz vs. National Metropolitan Bank*, as "a casual expression," but this characterization seems hardly justifiable. The effect of the Married Women's Act upon the husband's tenancy by the curtesy was *the essential question in the case of Hitz vs. National Metropolitan Bank and the ground of reversal of the Supreme Court of the District of Columbia*, which had, in a very full opinion by Justice Hagner (*Bank vs. Hitz*, 1 Mackey, 111), held the contrary against a very vigorous dissent by Chief Justice Cartter (pp. 138-40).

The Supreme Court of the United States did not regard its consideration and decision, in *Hitz vs. National Metropolitan Bank*, 111 U. S., as a "casual expression," because, in *Mattoon vs. McGrew*, 112 U. S., 713, decided about six months later (December, 1884), Chief Justice Waite says (p. 713):

"It is conceded in the brief filed for the appellee 'that the essential facts in this case are substantially like those in *Hitz vs. The National Metropolitan Bank*, 111 U. S., 722.' *That case was decided on full consideration after an elaborate argument on both sides, and we are satisfied with the conclusion then reached.*"

The Supreme Court of the United States has had occasion to consider the Married Women's Act in three other cases since the decision in the *Hitz* case, viz:

In *Stickney vs. Stickney*, 131 U. S., 227, Mr. Justice

Field, delivering the opinion of the court, referring to the wife's property, says (p. 237):

"That property no longer, as at common law, vests in her husband by the marriage. That act provides as follows: (quoting the statute)

"So far as her separate property is concerned, a married woman thus becomes as absolute owner as though she were unmarried."

In *Keyser vs. Hitz*, 133 U. S., 138, the court considered the married woman's emancipation for the purposes of being liable on her own contract, and in *Hamilton vs. Rathbone*, 175 U. S., 414, it considered her power to devise under the act. In no one of these cases did it qualify the language used by it, in *Hitz vs. National Metropolitan Bank*, and it is respectfully submitted that the decision has, therefore, not been overruled or qualified.

But if the construction of the statute advanced in *Smith vs. Smith*, 21 D. C., 289, and in *Uhler vs. Adams*, 1 App. D. C., 392, be adopted, the *ratio decidendi* of those cases shows that after the statute the *wife's rights* in her property were so fully and completely protected that there is nothing left upon which a trust for her separate benefit could operate, and nothing which could be secured to her by that means which was not already covered by the statute.

Both of those cases hold that, by *the terms of the statute*, the wife may convey or devise her lands without the consent or cooperation of her husband and that such conveyance or devise will operate to defeat any estate by the curtesy; that it is only in the event of her dying *intestate*, without having disposed of the land, that his curtesy would attach (1 Mackey, 292, 293, 296).

In *Uhler vs. Adams*, 1 App. D. C., it is said (pp. 398-9):

“The act *unquestionably* gives the married woman *the power to destroy it*, either by the conveyance of her estate by deed or by the devise of it in her will.”

So, also, both of those cases *agree* that the claim of tenancy by the curtesy is no clog or burden *upon the estate of the wife, during her life*, but that it is a burden solely upon the *inheritance after her death*.

In *Smith vs. Smith*, 1 Mackey, it is said (pp. 292-3):

“It is clear that the particular purpose of this statute was to secure to married women complete independence of capacity in regard to their property; and it is equally clear that when the wife dies, whether testate or intestate, she must be said to have enjoyed every benefit which the statute intended to secure to her. In leaving her property to be disposed of by the law, when she had power to dispose of it herself by devise, *she will have enjoyed all the freedom of action that can belong to proprietorship.*”

And further (p. 296):

“We do not find authority for saying that the husband must have had some right during the life of the wife, in order to have an estate by the curtesy after her death. We are of opinion that the fact that he has no interest in her lands during coverture, is not sufficient by itself to make curtesy impossible in case she dies intestate. . . . At the common law, when issue was had, the *right* of the husband *to have curtesy, in case he should survive her*, was absolute. The consummate estate, or more properly speaking, *the estate began at her death.*”

In *Uhler vs. Adams*, 1 App. D. C., 392, this court distinctly holds the tenancy by the curtesy to be no part

of the *wife's* estate, but to be a thing carved out of the inheritance, saying (p. 399):

“By the common law, *upon the death* of a married woman, who has had children by her husband, *two separate and distinct interests are carved out of her estate*—one an estate for life in her surviving husband, the other a reversion in fee in her heirs. *She may prevent either or both by her will or by her deed. She may dispose of the property as she pleases.*”

And further (p. 400):

“It was undoubtedly the purpose of the statute *to abolish all interest, power and estate* of the husband that *militated against the right of the wife to hold and dispose of her own estate as she thought proper*. But certainly it can not in reason be maintained that a married woman's right is *any the less absolute*, because the law, *after her death*, makes provision for its disposal, when she herself has failed to make any disposition of it during her lifetime.”

And further (p. 401):

“There is no question here of a *wife's estate*, or of a *wife's right of possession or power of disposal*. The wife is dead. *Her estate is gone*. She is *no more than a remote ancestor* through whom the property is derived.”

So it is seen to be a demonstration from the authorities as follows:

1. That all three courts, the Supreme Court of the United States, this Court, and the Supreme Court of the District of Columbia, *concur* in holding that this statute absolutely abolishes and destroys all marital rights and control of the husband and of his creditors, in his wife's property, *during her life*.

2. That by the unreversed decision of the Supreme

Court of the United States, in *Hitz vs. National Metropolitan Bank*, 111 U. S., 722, the tenancy by curtesy *was abolished*.

3. That all the courts hold that the wife has the absolute and unrestricted power to convey and devise her estate and by such act to *defeat* curtesy if it be conceded to exist.

4. By the Supreme Court of the District and by this court, that the estate by *curtesy* is *no part of the wife's estate* and has no existence *during the life of the wife*, but is an estate, for life, by *inheritance*, arising *only after the death* of the wife *intestate*, and without having conveyed the land.

5. That no trust estate for the purpose of creating a separate use for a wife free, *during her life*, from the marital rights of a husband can be devised which will give her a larger estate, or larger powers than are conferred by the Married Women's Act.

6. The trust created by this will being, by its express terms, limited to the use benefit and behoof of Mary Hilbus "*for her natural life*," "free from any *control* or *interest*, *claim* or *demand* of any future husband," creates no estate in the trustee for her benefit, because, by concurrence of all three of the courts, any "*control*," "*interest*," "*claim*" or "*demand*" which any future husband could lawfully assert "*during the term of her natural life*," had been absolutely abrogated by the Married Women's Act, *proprio vigore*, and without the necessity for any act by her or by any one for her.

And, as shown by the agreed facts in this case, she *exercised* her statutory power of alienation by conveying to Wheelwright in fee (Rec., p. 10).

These views, it is respectfully submitted, are not in conflict with any decisions by this court. The court below appeared to consider the decision by this court in

Slater *vs.* Rudderforth, 25 App. D. C., 495, as holding the contrary and as being decisive of this case (Rec., p. 6). But, it is respectfully submitted, the decision in that case can not have that effect. The trust in that case was created by a will "executed in 1859, and upon the death of the testator very soon afterwards was admitted to probate *in the same year*" (25 App. D. C., p. 499). The trust there created became operative *ten years before* the Married Women's Act was enacted, and was, of course, to be construed under the law as it existed *at the time the will went into effect*, and this court did not have before it any question as to the effect of such a devise, made *after* the passage of the statute. Moreover the trust was a very *active* one, imposing many duties, including collection and distribution of rents and conveyance of the property to different persons under different conditions.

None of the cases cited by this court, in its opinion, in Slater *vs.* Rudderforth, *supra*, applies to the case at bar. Those cases (cited on pp. 507-8 of the report) are:

Frey *vs.* Allen, 9 App. D. C., 400.

Fields *vs.* Gwynn, 19 App. D. C., 99.

Brown *vs.* Wadsworth, 168 N. Y., 232.

De Vaughn *vs.* De Vaughn, 3 App. D. C., 50.

In Frey *vs.* Allen, 9 App. D. C., 400, the trust arose upon a *deed*, executed March 18, 1868, thirteen months *before* the passage of the Married Women's Act (p. 401), and was a "*special and active trust*" (p. 404).

In Fields *vs.* Gwynn, 19 App. D. C., 99, the trust was a very *active* trust, and *deprived the cestui que trust of all powers she would have had under the statute*. It declared, *inter alia*, that she should "*have no powers to alienate, transfer, sell or encumber,*" "*nor to dispose of the same by deed or will*" (p. 101).

In De Vaughn *vs.* De Vaughn, 3 App. D. C., 50, the

trust was created by a will dated in 1861 and "admitted to probate about the 1st of September, 1867" (pp. 50-51). more than a year and a half *before* the passage of the "Married Women's Act," and the decision of the case turned on the construction of *the words of ultimate limitation to the heirs* (pp. 55-59).

The only other case, *Brown vs. Wadsworth*, 168 N. Y., 225, depended upon New York statutes. The deed in question was made in 1827 (p. 231), and by it, as stated in the opinion, "*an active trust* was declared for the life of Mrs. Russ, and for her benefit, a trust ordered by chancery, and therefore one which chancery would enforce" (p. 232).

The terms of the deed were (p. 227):

"In trust, nevertheless to demand, receive and recover the rents, issues and profits of such premises and to pay over the same to the said Catharine Russ for and during the term of her natural life, or to such person as she shall from time to time, but not by way of anticipation, notwithstanding her coverture, direct and appoint, to be for her sole and separate use, and in no way subject to the control of debts or incumbrances of her husband," etc.,

with the further trust, *after her death, to pay the income to the husband for his life*, and then for the use of the right heirs of Catharine Russ.

From this review of the cases, it is quite clear that there is no adjudication in any of them to the effect that an *inactive* trust purporting to create a separate estate, for life, for a feme covert in this District, since the passage of the Married Women's Act, is excepted from the operation of the statute of uses. The sole ground of exception in such cases is the *necessity* to protect the wife's estate from the *legal* marital rights of the husband. This doctrine is announced by the Supreme Court of the United

States in *Bowen vs. Chase*, 94 U. S., 812, in which Mr. Justice Bradley says (p. 817):

“But we think that the authorities are very clear, that where a trust is thus created for the benefit of a married woman, *for the purpose of giving her the separate use and control of lands free from the control of her husband*, it will be sustained, since to merge the trust in the legal estate or, to speak more properly, to convert it into a legal estate, *would have the effect of placing the property in the husband’s control by virtue of his marital rights and would thus defeat the very purpose of the trust.*”

Certainly it can not be contended that if Earl, the testator, had devised this estate to his daughter outright, for life or in fee, by his will, operating *after* the act of April 10, 1869, and she had thereafter married, that such devise would have had the effect of “placing the property in the husband’s control by virtue of his marital rights,” for that is precisely what the statute forbids. Indeed the statute had no other purpose than to secure to married women the sole and separate ownership and control of their property, freed from any right in or control by their husbands and to give to them an unfettered power of disposition. The effect of the statute was to render deeds in trust for that purpose both unnecessary and superfluous, and, as is well known to the profession and to the courts, such deeds have, since the statute, fallen into disuse.

b.

The Supposed Trust in the Will Comprehends Nothing Not Covered by the Married Women’s Act.

Bearing in mind that the sole purpose of the courts in holding that a trust for the sole and separate use of a married woman is not executed by the statute of uses is

to protect her from the marital rights of her husband which would attach to a legal estate, as held by the Supreme Court of the United States, in *Bowen vs. Chase*, 94 U. S., 817, it remains to be seen whether the will in this case preserves any right in the devisee which the statute would not preserve in the case of a legal estate.

The learned justice, in his opinion in the court below, suggests two reasons for the creation and maintenance of the trust as matters within the protection of the will and not within the protection of the Married Women's Act. The first is tenancy by the curtesy, with respect to which the court says (Rec., p. 6):

"But the Married Women's Act did not completely deprive the husband of his old common law rights. For instance, if a married woman, the owner of real property, upon which the Married Women's Act operated, died intestate, there having been born of such marriage children, the husband's right to the exclusive possession and enjoyment of said real estate for his life remained as at common law. *Smith vs. Smith*, 21 W. L. R., 71; *Barrett vs. Byrne*, 21 W. L. R., 75; *Uhler vs. Adams*, 1 App. D. C., 392, 398.

"Even then if the contention of the defendant is sound as to the other common law rights of the husband here is one against which the testator could have provided. This would suffice to save the devise from the operation of the statute of uses, and doing so it is not necessary to determine otherwise the soundness of the defendant's contentions."

It has already been pointed out that even if tenancy by the curtesy could exist since the statute, still it is no part of the *life* interest of a wife, but is a part of the *inheritance*, arising *after her death*, while the supposed trust under the will is limited to the period "*for and during the term of her natural life*" (Rec., p. 10). The protection of

the will, therefore, does not extend to curtesy, and even if the statute does not, neither does the supposed trust.

Moreover, tenancy by the curtesy can not exist unless the wife had an *estate of inheritance* and had issue born alive capable of inheriting the estate. If Mary Hilbus took an *estate of inheritance*, capable of supporting a tenancy by the curtesy, which the supposed trust under the will could prevent from attaching, *then her deed in fee to Wheelwright* (Rec., p. 10) *passed that estate in fee*, and the defendant was entitled to judgment.

The other suggested function of the trust, made in the opinion, is that (Rec., pp. 6-7):

“It is quite conceivable that notwithstanding the Married Women’s Act, there still may exist the strongest reasons for protecting a wife from the possible threats or cajolery of a husband seeking to obtain from her in one way or another the benefit of her statutory real estate. *Fields vs. Gwynn*, 19 App. D. C., 99, 109, et seq.”

It is respectfully submitted that the “*threats or cajolery of a husband seeking to obtain from her in one way or another the benefit of her statutory real estate*” are not *legal marital rights*, against which either the statute or an equitable separate estate provide, but are *unlawful and fraudulent acts*, acts of coercion and undue influence, to be redressed, if committed, by a proper judicial proceeding, but against which neither the statute nor the supposed trust is an injunctive protection.

That a married woman has an absolute power to dispose of her sole and separate estate, whether secured to her by statute or by equitable provision in a deed or will, *unless restrained by the deed or will*, is not open to question in this court. In *Zeust vs. Staffan*, 14 App. D. C., 200, 215-220, Chief Justice Alvey, in an elaborate opinion, reviews the leading English and American cases, and shows that the right is unqualified.

The wife having this power, “threats and cajolery”

or other unlawful conduct of the husband could as effectively secure a conveyance from her of an equitable estate as of a legal one. In *Fields vs. Gwynn*, 19 App. D. C., 99, cited by the learned judge in his opinion, the trust did contain such restraints, as heretofore pointed out. She was to "have no powers to alienate, transfer, sell or encumber," "nor to dispose of the same by deed or will," and there was also a clause providing against *anticipation* (p. 101). Such provision would operate as a considerable obstacle to "threats and cajolery," but the will in this case contains no such provisions; it is simply "In trust for my daughter . . . for the sole benefit and behoof of her . . . free from any control or interest, claim or demand of any future husband."

It is quite true, as suggested by the learned justice, that the statute does not protect against "threats and cajolery," but neither does the supposed trust.

III.

If the Life Estate Is Equitable, So Also Is the Remainder to the Heirs of the Life Tenant.

Taking the devise as a whole and eliminating the description of the property and all unnecessary verbiage and it reads thus (Rec., p. 10):

"I give and bequeath unto Solomon Stover in trust for my daughter, Mary Hilbus, . . . those two lots . . . together with the improvements . . . the said premises to be for the sole use, benefit and behoof of her, the said Mary Hilbus, for and during the term of her natural life, . . . and at her death the said lots of ground and premises . . . to be the property of her heirs in fee simple forever."

It is respectfully submitted that this devise is no different in law than if the testator had said briefly, "I give and bequeath said two lots to Solomon Stover in

trust for my daughter for her natural life and after her death for heirs in fee simple."

There is no direct devise either to Mary Hilbus or to her heirs; the devise is to Solomon Stover, "*in trust*," and he is neither required nor authorized to make any conveyance, to collect or distribute rent, or to release his estate to the heirs at the death of the mother or at any time, nor is there anything in the devise which defeats his legal title on the death of Mrs. Hilbus.

If, therefore, it can be accurately said that the interest of Mary Hilbus for life is an equitable one, the remainder to her heirs is also equitable and if the statute of uses executes one it executes both. If it executes neither, then both estates being equitable, they coalesce.

IV.

Judgment Erroneous on Its Face.

Even if appellants were not entitled to a reversal of the judgment and to the entry of judgment in their favor, the judgment as entered is erroneous and would have to be modified.

In their declaration the plaintiffs only claimed an undivided *two-thirds* as tenants in common (Rec., p. 2); the agreed facts showed that they were only heirs of an undivided two-thirds (Rec., p. 11), and the court, in its opinion, found that plaintiffs were entitled to an undivided two-thirds interest (Rec., p. 7).

The judgment, however, is that the plaintiffs recover possession of the *whole premises instead of an undivided two-thirds* (Rec., p. 7).

It is respectfully submitted that the judgment for the plaintiffs upon the first count should be reversed and the cause remanded with directions to enter judgment for the defendant, Eric Bergland.

WM. G. JOHNSON,
Counsel for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 17 1917

IN THE *Henry W. Higgins*
Obitor
Court of Appeals, District of Columbia

OCTOBER TERM, 1917.

ERIC BERGLAND, *Appellant,*

vs.

FANNY J. OWEN, *et al., Appellees.*

No. 3118.

BRIEF FOR APPELLEES.

CHARLES A. KEIGWIN,
C. ALBERT WHITE,
Attorneys for Appellees.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1917.

ERIC BERGLAND, *Appellant*,
vs.
FANNY J. OWEN, *et al.*, *Appellees*.

No. 3118.

BRIEF FOR APPELLEES.

If the estate in trust for Mary Hilbus for her life, which the will of Robert Earl created in Solomon Stover, was by the Statute of Uses executed as a legal estate in Mrs. Hilbus, then she took an estate in fee under the rule in Shelley's Case, and her conveyance of the property, under which the appellant (defendant below), claims, vests a valid fee simple title in him.

If, on the other hand, the Statute of Uses did not operate upon the equitable estate created in the trustee so as to make it a legal estate in the beneficiary, Mrs. Hilbus, then the case is within the well recognized exception to the rule in Shelley's Case, that the rule does not apply where one of the estates is equitable and the other legal; and in that event, the beneficiary took only an interest for her life, and

her attempted conveyance of the fee was void as against her children, the remainder men, who were plaintiffs below seeking to recover their rights in remainder after the death of the tenant for life.

The sole question in the case is, therefore, whether the Statute of Uses operated upon the equitable estate for life granted by the will to Mrs. Hilbus so as to convert it into a legal estate.

A trust estate created for the benefit and protection of a married woman, or for the benefit and protection of any woman in anticipation of her marriage, is—as is well settled—excepted from the operation of the Statute of Uses; and such exception exists although the trust be a merely passive one, the whole enjoyment and uncontrolled management of the property being in the *cestui que trust*, and the trustee having only a dry legal title:

Frey v. Allen, 9 App. D. C. 400.
 Brown v. Wadsworth, 168 N. Y. 232.
 Nevin v. Gillespie, 56 Md. 320.
 Shreve v. Shreve, 43 Md. 382.
 Bacon's Appeal, 57 Pa. St. 504.
 Rife v. Geyer, 59 Pa. St. 343.
 Harton v. Harton, 7 T. R. 653.

When an estate is settled to the use of a married woman, the courts will strive to adopt the construction which is most for her advantage, and not allow the trust to be executed by the Statute of Uses.

Hill on Trustees, p. 407.

Even where, as in the case of the trust estate created in favor of Madame Jumel by her husband, it is left to the election of the woman herself whether the trust shall be an

active one on the part of the trustee or she shall herself control the property, the equitable title of the trustee is not converted into a legal estate in the woman:

“since to merge the trust in the legal estate, or, to speak more properly, to convert it into a legal estate, would have the effect of placing the property in the husband’s control by virtue of his marital rights, and would thus defeat the very purpose of the trust”:

Bowen v. Chase, 94 U. S. 812.

So far as this District is concerned, the rule, that an equitable estate in favor of a married woman is not converted into a legal estate in her, is established by at least two very well considered cases in this court, both involving trusts for married women which were in substantial purpose and effect identical with that here presented. And it seems to counsel for the appellees that the present case is completely controlled by those cases unless both decisions, laying down a rule of property, are to be flatly overruled:

Fields v. Gwynn, 19 App. D. C. 99;
Slater v. Rudderforth, 25 App. D. C. 497.

Equitable Estates for Married Women not Affected by the Statute of Uses.

Such a provision for the benefit or protection of a woman in the event of her marriage is effective to create an equitable estate and to exclude it from the operation of the Statute of Uses, without regard to her being presently married or in contemplation of immediate marriage. Although upon this point there has been, in the older cases especially, some diversity of ruling at different dates and in different jurisdictions, it will be found upon attentive consideration

that the diverse rulings are due chiefly to differences of language used, or to differences in the circumstances existing, in the individual instances. The general effect of the authorities is that the operation to be given to such a settlement is altogether a matter of intention as manifested in the particular case; and that the privilege and disabilities created by a trust having regard to the marriage of a woman depend upon what the settlor appears to have intended.

2 Perry on Trusts, sec. 653.

Winchester v. Machen, 75 Md. 538.

Bispham's Equity, 2d Ed., Sec. 98-99 and cases.

However the authorities may be elsewhere, it is clear that, in this District, an equitable estate may be created for the benefit of any woman with respect to her marriage, whether actual, prospective or merely potential, and without regard to the present fact or any concrete probability of her being married.

In *Bowen v. Chase*, *supra*, the trust was created by M. Jumel in favor of Madame Jumel, who was at the time the wife of the settlor, and the provision, that the estate should be free from the control of her present or any future husband, had regard to a marriage which could not be in contemplation until after the lady should have become a widow, a marriage which was certainly not at the time in the mind of the settlor as a definite probability.

In *Slater v. Rudderforth*, *supra*, the beneficiary of the equitable estate was, at the time of the will, a little girl only seven years of age, not married of course, and certainly not contemplating marriage. She was not to become entitled to the benefit of the settlement until she should reach sixteen, at which age she could hardly have been expected to be in contemplation of an immediate marriage. In point of fact, she did not marry until she was eighteen, eleven

years after the settlement was made. And it was held that this equitable estate, which did not vest for nine years, and which was clearly not made in anticipation of any specific marriage, was valid as against the Statute of Uses.

The Married Woman's Act of 1869

does not destroy the ancient exception with respect to trusts for married women, nor does it bring the present trust estate within the operation of the Statute of Uses.

A. The very same contention now made on behalf of the appellant, that an equitable estate in trust for a married woman is converted by the Act of 1869 into a legal estate in her, was made, and was overruled, in *Fields v. Gwynn*, *supra*; see the argument of counsel, stating this proposition very exactly and with copious citation of cases supposed to support it, on page 103. Part of the brief on this point is quoted and expressly disapproved in the opinion on page 109.

In *Fields v. Gwynn*, the trust was created in 1873, four years after the enactment of the Married Woman's Act, and the attempted alienation of the property by the *cestui que trust*, on the theory that she had a legal estate, was made in 1898. The whole transaction, therefore, was unquestionably subject to the Act of 1869; and, if that statute had the effect herein sought to be given it, the alienation was effective. But the court held distinctly, and was, in order to reach the conclusion acted upon, obliged to hold, that the trust estate remained effective, though it was the driest of all possible trusts, notwithstanding the statute was in force throughout the entire period of the case.

In *Slater v. Rudderforth*, *supra*, the trust was created in 1859 in favor of a girl then seven years of age. This, also, was an absolutely dry trust, the entire enjoyment and control of the estate being vested in the *cestui que trust* after

she should reach the age of sixteen, or in 1868. From the opinion of the lower court, page 502, it may be inferred that she did not marry before she was eighteen, or in 1870. The court, in holding that the beneficiary took only an equitable estate was manifestly not in the least embarrassed by the possible effect upon the case of the Married Woman's Act; but said:

“That Emma Smitson, afterwards Emma F. Rudderforth, took only a life estate and not an estate in fee simple under the rule in Shelley's case, in the property here in controversy, and that upon her death the appellees, as her issue surviving her, took an estate in remainder, we regard as too clear to be a subject of controversy. Under the will of William Mockabee she had only an equitable estate, while a legal estate in fee simple was given to her issue; and it is well settled law, indeed it is elementary law, that the rule in Shelley's case does not apply where one of the estates sought to be carried out is equitable and the other is legal. *Sims v. Georgetown College*, 1 D. C. App. 72 and cases there cited. It is sought to avoid the operation of this doctrine on the ground that the equitable estate to Emma F. Rudderforth, as it is claimed, was a passive and not an active trust, and therefore under the statute of 27—Henry VIII, Chap. 10, the donee of the life estate must be regarded as taking a legal title. But the law is directly the reverse of this, and we have so held. *Frey v. Allen*, 9 D. C. App. 400; *Fields v. Gwynn*, 19 D. C. App. 99; *Brown v. Wadsworth*, 168 N. Y. 232; 4 Kent Com. 9, 218; *De Vaughn v. De Vaughn*, 3 D. C. App. 50. A trust of this kind for a married woman is not a passive, but an active trust, to which the rule in Shelley's case does not apply. The appellees, therefore, took a legal estate in fee simple in remainder.”

The appellant's argument is pervaded by the fallacy that the mere enactment of such a statute as the Act of 1869

renders, not only unnecessary, but actually impossible, all special provisions for the protection of married women by deed or will. For this, his fundamental postulate, opposing counsel cites no authority. Against this gratuitous assumption are all the cases in which courts have considered the effect of similar enactments upon settlements previously made.

Statutes removing the disabilities of married women and curtailing marital rights are very generally, if not indeed universally, construed as not affecting settlements of the character now under consideration on this point. *Slater v. Rudderforth* and *Fields v. Gwynne*, *supra*, are quite in accord with the prevailing current of authority. We cite a few of the leading authorities.

“It can not be supposed that the statute is designed to affect the capacity of a donor to devolve on a woman, married or sole, any estate not prohibited by law or to diminish the capacity of the woman to take. The donor may create, and the donee may take since the statute, any estate which could be created or taken prior to its enactment. The statute affects and impairs only the marital rights of the husband. Where an equitable estate is created by a *gift, conveyance, or devise, an estate is created differing in nature and quality from the estate of the wife under the statute.*”

Short v. Battle, 52 Ala. 466 (1875).

In *Penn Co. v. Foster*, 35 Pa. St. 134 (1860), the court, speaking of the Married Woman's Act of 1848, says:

“The kind of separate estate thereby created is a legal one, and totally distinct from the equitable estate created close by the tripartite agreement. The act creates a new kind of separate estate without abolishing the old one; in providing a mode of disposing of her

new legal acquisitions of a separate estate, it does not include those equitable estates that are acquired by others in trust for her separate use."

"The statutes which secure separate estates to married women do not interfere with, abolish or abridge the equitable estates which exist in trust and arise out of settlements by deed or devise."

Musson v. Trigg, 51 Miss. 172 (1875).

"But it is plain that its provisions (Statute of 1887) like those of the act of 1848, apply to the separate estate at law of the married woman, as distinguished from the separate estate which has always existed in equity. *The owner of real estate, so long as he contravenes no rule of law or of public policy, may undoubtedly make such a settlement of it upon another as he chooses, and there is nothing in the Act of 1887 which would deny the right of the donor to set up a trust for the maintenance and protection of a married woman securing his bounty as heretofore. The passage of these acts do not affect the right of a married woman to a settlement upon herself. There are an enlargement and not a diminution of her rights.*"

McConnell v. Lindsay, 131 Pa. St. 490.

"General property acts relating to married women have not destroyed their equitable separate estates."

21 Cyc., page 1364.

B. The Act of 1869 does not altogether abrogate the common law rights of the husband in his wife's estate, his right to curtesy, in the absence of a devise by her, being still left him.

The *dictum* in Hitz v. Bank, 111 U. S., 722, which is relied upon by the appellant as a holding to the contrary, was maturely and with due respect considered by this

Court in *Uhler v. Adams*, 1 App. D. C., 392, and was held not to have the effect now sought to be attributed to it. However, the language of the Supreme Court in the *Hitz* case might be interpreted, if the meaning of that language were *res integra*, the parties and counsel are no longer at liberty to consider it as an original proposition. The construction of that opinion deliberately declared by this Court in *Uhler v. Adams*, adopting the ruling of the Supreme Court of the District in two prior cases on the same point, has established a rule of property in this District, acted upon now for twenty-five years, upon which many titles depend, and from which this Court, it is assumed, will not lightly depart.

As the husband's right to curtesy—if no other—in his wife's estate still exists, despite the Act of 1869, that statute does not altogether render nugatory an equitable settlement designed to exclude him from all rights in the estate, and can not be taken as superseding such a settlement, whether made before or after the statute.

C. Even if the husband had no vestige whatever of the marital rights conferred by the common law, reasons would still exist for the protection of married women, not only against their husbands, but against themselves.

An overbearing husband, an ill-tempered husband, a cajoling husband, a husband of speculative disposition and of over-plausible speech or over-persuasive manners, may still acquire as much control over his wife's property as ever could a husband in the exercise of his common law authority. In point of fact, it is probable that most fathers, in making settlements in trust for their married or marriageable daughters, were as much, or more, influenced by considerations of the dangers of indiscretion to be induced by marital blandishments or marital ill humor, as by dread of disaster to be caused by the direct exertion of marital

authority. And the same considerations still operate, and will continue to operate, notwithstanding the theoretical emancipation of married women from conjugal control. As was observed by this Court in *Fields vs. Gwynn*, *supra*:

“Some of the conditions that led to the creation of the equitable separate estate of the wife, before the modification or abolition of the harsh rule of the common law by modern statutes, continue to exist because they are inherent in the marital relation. The same reasons that then existed for the protection of the wife from the rapacity and improvidence of the husband, and raised up the equitable doctrine that the settlement of such an estate could be accompanied with a restraint upon anticipation or alienation, as long as the coverture continued, are equally as strong as when that doctrine was first established.

“For those considerations, as the statute does not expressly prohibit, or put an end to, the erection of those time-honored equitable separate estates, by deed or will, with their recognized limitations, courts of equity will not raise up an intent to do so by implication.

“The more reasonable view of such enactments is, that they were intended to enlarge the legal rights and privileges of the wife, without in any manner interfering with or affecting such equitable separate estates as may be created for her benefit and security, by deed or devise.”

If the Act of 1869 makes it impossible to create a trust estate which the statute will not execute, paternal solicitude can no longer find assurance the daughter shall not be brought to want through her wifely affection and her confidence in her husband, or through her own speculative disposition and lack of discretion.

D. The Act of 1869 does not affect the evidence afforded by the will of the testator's intention. In any case where

the law is changed intermediate the making of a will and the testator's death, the old law may, and should be, considered to ascertain the meaning of the language used and what effect the testator intended to be given to the provisions made by him. A will is always made with reference to existing law, as the testator is advised thereof and understands it, and not in prophetic anticipation of the fact that the law will be altered before he dies. The intended effect of a will, therefore, is the effect which would be given it by the law in force at its date; and, however an alteration of the law before the testator's death may affect the operation of a given provision within the scope of the new enactment, the original law must still be looked to where the question is as to what was meant by the will when it was drafted.

In the present case, for instance, Mr. Earl manifestly intended to make provision, not only for his daughter's security during her life, but for his grandchildren after her death. The daughter had been married, and had children living at the date of the will; it was perhaps not unlikely that she would marry again—at any rate, her father evidently regarded that as possible; it was certainly his purpose to assure Mrs. Hilbus a provision for her life; and it is necessary to infer that his purpose included also a provision for his grandchildren, who were as much in his contemplation as the daughter herself.

To effect this two-fold purpose, the testator availed himself of the provisions of the law as it then existed, the presumption being that he was duly and correctly advised both as to the operation upon his devise of the rule in *Shelley's* case, and as to the efficacy, under the then present law, of the trust estate to insure the lifetime ownership of the daughter and also to preserve the remainder for her children. It is possible that, in all this the father may have been in part influenced by the apprehension that the hypo-

thetical future husband of his daughter might exert his marital rights under then existing law to her prejudice; and had that been the only concern manifested by the will, there would be some plausibility in saying that the change of the law made in 1869 dispensed with the necessity for the trust estate. But the scope of the provision as actually made includes at least two other intentions and considerations, both clearly evidenced: first, that the daughter should not be at liberty to deprive herself of the property by alienation in her lifetime; and, second, that her children should be assured of the property after her death. With reference to these two purposes, the Act of 1869 had no effect; the reasons for the original settlement would continue to operate with equal force though the possible husband had no power at all, and though there should be no husband at all.

The testator did, in fact, live until after the Act of 1869 was passed. Perhaps that statute—assuming that it was brought to his knowledge, and that its bearing upon his then written will was brought to his attention—relieved his mind of all fear as to the potential calamities to be caused by an exercise of marital authority in case Mrs. Hilbus should marry again. But the father lived for five years after this ground of apprehension was removed, and he perceived in the alteration of the law no reason for altering the arrangement that he had made to secure the welfare of his daughter during her life and the welfare of his grandchildren after her death.

If, now, it is a presumption of law that the testator, living after the Act of 1869, intended that statute to operate upon his devise, it is equally an inference of law that he intended that devise to secure an inalienable title to the daughter for her life and an indefeasible title after her death to the grandchildren. It may well be that the father, although no longer concerned about the exertion of a possible husband's legal authority over the property, recognized the possibility

of a husband's moral influence as a danger to the daughter's continued possession of the property; and he may also have felt that his daughter, whether married or single, would be in danger from her own inexperience and unsound judgment should she be at liberty to deal freely with the estate.

At any rate, from the fact that the testator settled the estate in the form chosen by him, and that he left that disposition unaltered after the Act of 1869 had rendered—if it did render—the form of settlement unnecessary for one purpose, it must be inferred that he intended that his daughter, whether married or widow, should have in the property only an estate for her life. To effect this design he adopted the device disclosed in the will, a device which was effective at the time, not only to protect the daughter against a supposable husband, but for other purposes as well. The sale by Mrs. Hilbus was an attempt to defeat his design. If that design is, as it is submitted that it is, clearly manifested by the will, then it can not be thus defeated, but must be given effect without regard to the changes in the law made by the Act of 1869.

The general canon, that the ascertained intention of the testator shall control all the expressions used in the will, applies to devises within the rule in Shelley's case unless directly and necessarily opposed to the rule itself.

“Though the rule [in Shelley's case] is recognized as one of property, yet if there are explanatory and qualifying expressions. from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield to the latter.”

De Vaughan v. Hutchinson, 165 U. S., 566.

The rule, though applied where clearly applicable, is still not favored by the courts, because it so often operates to defeat the testator's presumable intention.

Sims v. Georgetown College, 1 App. D. C., 79.

In a case, therefore, like the present, where the testator's intention is so clearly ascertained, it is assumed that the Court will lay hold of every circumstance which will enable effect to be given to that intention and to exclude the operation of the arbitrary rule which disregards the usual purpose of the devise. It is here beyond doubt demonstrated that the testator desired and intended that his daughter should have only a life estate, and that the remainder should be preserved for the benefit of his grandchildren. The conveyance by Mrs. Hilbus was designed to defeat that intention by taking advantage of a legal principle which is at least artificial, if not essentially unjust. And the judgment appealed from has—apart from its technical correctness and the sound reasons in its favor—the merit of awarding the property to the grandchildren who were the objects of the testator's bounty and who were presumably as much within his contemplation and benevolent purpose as was the tenant for life.

The opinion of the learned justice who decided this case in the Supreme Court of the District states the law on the points involved, and the considerations controlling the case, with such clearness and force as to be unanswerable; and it has hardly been necessary to amplify his argument as has been done in the present brief, since that opinion seems to counsel to afford abundant reason for the conclusion therein stated.

It is accordingly submitted that the judgment appealed from should be affirmed.

CHARLES A. KEIGWIN,
C. ALBERT WHITE,
Attorneys for Appellees.

